HARV. L. REV. 220.[1] Nevertheless, an Act of Congress temporarily imposing duties on articles brought into such territory from the United States, and providing that the proceeds should be used for the benefit of the territory ceded, does not violate Art. I., sect. 8, § 5 of the Constitution, requiring that "no tax or duty shall be laid upon articles exported from any state." *Dooley* v. *U. S.*, decided Dec. 2, 1901. The remaining case, upon the construction of certain acts of Congress and New York statutes, decided that a ship licensed to trade between New York and Porto Rico was engaged in a "coasting trade," and not being "from a foreign port" was not by the statute required to employ a pilot on entering New York harbor. *Huus* v. *N. Y., etc., Co.*, 182 U. S. 392. Under similar facts it would seem that the same doctrine must apply to a ship trading between this country and the Philippines.

These decisions establish clearly that Congress has a large discretion in legislating for the new possessions. While all the members of the Court seem of the opinion that such legislation is not absolutely free from restraint, the reasons supporting the conclusion differ so greatly that the extent of the restraint is entirely an open question. Furthermore, since but few clauses of the Constitution have been interpreted and since the conclusions are supported by a bare majority, the final determination of the exact legal status of the new possessions may still be thought a matter of considerable doubt.

RECOVERY IN ASSUMPSIT OF MONEY DUE IN FUTURE. — A recent decision in a United States Court of Appeals, raises a perplexing question in damages for breach of contract. A federal statute requires all persons having building contracts with the government to furnish a bond conditioned for the "prompt payment" of material-men, and authorizes suit on the bond by the beneficiaries. By contract between the defendant, an obligor on a bond of this kind, and the plaintiff, a material-man, eighty per cent of the contract price of materials furnished each month was payable on the first of the following month, and the remaining twenty per cent when the building was completed. The defendant made several defaults in the eighty per cent payments, and the plaintiff abandoned the contract and sued at once on the bond. "Prompt payment" was construed as meaning payment when due, and it was held that the full contract price could be recovered upon the ground that the deferred twenty per cent fell due at once on breach by the defendant and refusal by the plaintiff to proceed. *Mullin* v. *United States*, 109 Fed. Rep. 817 (C. C. A., Second Circ.).

Since the action is on the bond it does not appear whether the amount recovered is based on the express contract or on a *quantum meruit*. A material breach by one party to a contract gives the other party the right to rescind and sue in quasi-contract, or to refuse to perform further and sue on the contract for damages. 14 HARV. L. REV. 317, 421. Strictly the right to rescind exists only when both parties are restored to their former position, and in England the right is kept well within these limits. *Hunt* v. *Silk*, 5 East 449. In America the injured party may generally rescind when he can and does restore or offer to restore every-

[1] In this last case the Court seems to rest the decision upon the ground stated; yet it is possible that the case did not necessarily involve anything more than a construction of the President's orders as intended to apply only to imports from "foreign countries."

thing that he has received under the contract. *Miner* v. *Bradley*, 22 Pick. (Mass.) 457. Rescission terminates the contract, and the obligation then resting on the other party is that of restitution *in specie* or in value. KEENER, QUASI-CONTS., 286. If the measure of damages in the principal case is based on this quasi-contract, the plaintiff, on being required to return all benefits received, should have recovered only the actual value of the materials furnished. The court, however, allowed him to recover the contract price and damages for the breach. In the quasi-contractual action after rescission neither damages for breach nor the contract price as such ought to be recovered; for the action has no relation whatever to the express contract. The price fixed by the contract would merely be evidence of the actual value. KEENER, *supra*, 289.

If the measure of the plaintiff's recovery is the damage sustained by breach of the express contract it is more difficult to see how the deferred payments can be said to be due before the time fixed by the contract. See *Miller* v. *Wilson*, 24 Pa. St. 114. Breach by one party and refusal by the other to proceed does not put an end to the contract. It still exists, but the injured party has an excuse for future non-performance. 14 HARV. L. REV. 425. The injured party has as yet suffered no damage as to the future payments, nor is he deprived of his action for them when they shall be due. The contract is indivisible, and the breach being material, the question is entirely one of damages. In cases where the present complete payment does not impose on the party in default too great a hardship there would seem to be strong grounds of expediency in favor of concluding the whole matter in one action. Moreover, in jurisdiction recognizing the doctrine of anticipatory breach as justifying full recovery at once, the breach may sometimes be construed as a repudiation of the future obligation.

A MORTGAGOR AS SURETY FOR HIS ASSIGNEE. — There is some difference of opinion as to the rights and relations of the interested parties where the purchaser of land from a mortgagor assumes the mortgage debt. Two late cases are of interest as involving these relations. In one the mortgagee agreed with the buyer to extend the time of the mortgage. After this time had elapsed he sued the mortgagor on his original covenant, and was allowed to recover since the mortgagor's remedies were not actually impaired when he had occasion to use them. *Forster* v. *Ivey*, 21 Can. L. T. 550. In the other case, the land failing to satisfy the mortgage debt on foreclosure, the mortgagee obtained judgment against the mortgagor for the balance. The latter sued in equity to force his assignee to perform his promise to pay, and was refused relief, and left to his remedy at law. *Thompson* v. *Lodge*, 58 Leg. Intell. 428 (Phila. Co.). Now what is the relation between the mortgagor and the buyer? As between themselves the assignee is usually regarded as the principal for whom the mortgagor is the surety. *Poe* v. *Dixon*, 60 Oh. St. 124. Although, as will be pointed out later, it seems that a true case of suretyship does not exist, a very similar relation is created. Certainly the buyer is expected to pay the debt, and the mortgagor is to pay only on his default. If the mortgagor pays he is entitled to a transfer of the premises from the mortgagee, to whose rights he is subrogated, and he can foreclose the mortgage or recover over against his assignee on the latter's promise to pay the debt. *Hart* v. *Chase*, 46 Conn. 207. As to the buyer then, he has the rights of indemnity and subrogation, which be-